LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
JAN 26 1972
E. ROBERT SEAVER, CLERK

No. 71-772

In the Supreme Court of the United States

OCTOBER TERM, 1971

ANTHONY D. MENNA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-772

ANTHONY D. MENNA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Southern District of California petitioner was convicted on one count of violating 18 U.S.C. 922(a)(6), by making a false statement as to his lack of a prior felony conviction to a licensed dealer in connection with the acquisition of a firearm. He was sentenced to imprisonment for one year and a day. The court of appeals affirmed (Pet. App. A).

Petitioner's principal contention in this Court is that he was entitled to an acquittal since the government introduced no proof that the weapon he purchased was in interstate commerce. Petitioner cites

United States v. *Bass*, No. 70-71, decided December 20, 1971, in which this Court held that 18 U.S.C. App. 1202(a) required proof that a felon's possession or receipt of a firearm was in or affected interstate commerce. He also contends that 18 U.S.C. 922(a)(6) must be read in the light of 18 U.S.C. 922(h) which prohibits *inter alia* previously convicted felons from receiving a firearm which has been shipped or transported in interstate commerce. Both Sections (1202(a) and 922(h)), petitioner argues, make it clear that his false statement was not "material" since there was no showing that the weapon in question was connected with interstate commerce.[1]

This contention is without substance. The prosecution here was not directed at petitioner's receipt of a weapon which moved in interstate commerce, but at his fraud in concealing a material fact. That petitioner's prior conviction was material is evident, as the court below ruled (Pet. App. A. 4-5), from the duties imposed upon the other participant involved in the sale. Thus, the licensed dealer here could not have sold or disposed of the weapon in question if he had known or had reasonable cause to believe petitioner was a convicted felon, irrespective of whether the firearm had moved in interstate commerce. 18 U.S.C. 922(d)(1). See *United States* v. *Trioli*, 308 F. Supp. 358 (D. Mass).

[1] Petitioner relied only on Section 922(h) before the court of appeals.

Petitioner also complains about the giving of a supplemental modified "Allen" instruction (set forth at Pet. App. C.) and the failure of the judge to inform counsel that the jury had stated it was divided 10–2 prior to allowing the jury to separate overnight. These contentions are answered in the opinion below (Pet. App. A. 5–6), on which we rely.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JANUARY 1972.

U.S. GOVERNMENT PRINTING OFFICE: 1972